Nos. 14486-14487

IN THE

United States
Court of Appeals

FOR THE NINTH CIRCUIT

HARRY JONES, *Appellant,*
vs.
UNITED STATES OF AMERICA *Appellee.*

CARRIE A. JONES, *Appellant,*
vs.
UNITED STATES OF AMERICA *Appellee.*

BRIEF OF APPELLEE

Appeals from the United States District Court
for the Eastern District of Washington
Southern Division

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JURISDICTION

The statement of jurisdiction as set forth in the appellants' brief, with reference to the statutes therein indicated, is accepted as accurate.

STATUTES INVOLVED

26 U. S. Code, Section 322 (b) (1):

"Period of Limitation. Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later . . ."

26 U. S. Code, Section 3772 (a) (1):

"No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner, according to the provisions of law in that regard, and the regulations or the Secretary established in pursuance thereof."

26 Code of Federal Regulations, Section 39.322-7:

"*Limitations upon crediting and refunding of taxes paid; general rule.* (a) Unless a claim for credit or refund of an overpayment is filed within three years from the time the return was filed by the taxpayer or within two years from the time the tax is paid, the Commissioner is prohibited from allowing or making a credit or refund of income tax imposed by chapter 1 for such year after both periods have expired. If no return is filed by the taxpayer, the Commissioner is prohibited from allowing or making a credit or refund of such tax after two years from the time the tax was paid unless, before the expiration of such 2-year period, a claim therefor is filed. * * *"

ADDITIONAL STATEMENT OF FACTS

In order that the questions involved may be better pointed out, it is deemed necessary that the evidence should be summarized.

The salient facts to be drawn from the evidence are:

1. On January 13, 1947, Harry Jones and Carrie A. Jones, appellants herein, mailed their income tax returns for the calendar year 1946 to the Collector of Internal Revenue, Tacoma, Washington (R. 7, 13). Mailed with the returns was Harry Jones' check in the sum of $3,195.58 in full payment of the 1946 tax liability of Harry and Carrie Jones (R. 30).

2. On January 14, 1947, the income tax returns and payment were received by the Department of Internal Revenue, Tacoma, Washington.

3. On or about January 15, 1947, appellants discovered a mistake in their income tax returns for 1946 and caused amended returns and claims for refund to be prepared and executed.

4. On or about January 15, 1947, Harry Jones placed the originals of the amended returns and claims for refund in a securely sealed envelope (R. 8, 13) addressed to the Collector of Internal Revenue, Tacoma, Washington, and placed the envelope with postage

prepaid thereon in the United States mail at Prosser, Washington (R. 8, 14).

5. A search of the records of the Seattle District Director's office of the Department of Internal Revenue, Collection Division, Tacoma, Washington, revealed no record of the receipt of the amended returns or claims for refund received prior to March 15, 1950 (R. ~~6~~, 15). Records of the Collection Division show receipt of amended returns and claims for refund for 1946 for Harry Jones on October 10, 1951, and for Carrie Jones more than one year later, on November 18, 1952.

Questions Involved

Because of the nature of the evidence in this case, it is felt that three questions are presented for determination, to-wit:

1. Is bare evidence of mailing, unsupported by any other evidence, sufficient to prove receipt of mailed matter?

2. Does evidence of nonreceipt rebut the presumption of receipt raised by evidence of mailing?

3. What constitutes filing within the meaning of 26 U. S. C. 322 (b) (1) and 26 U. S. C. 3772 (a) (1)?

SUMMARY OF ARGUMENT

The sole evidence of mailing in the instant case is found in the affidavits of appellants. This evidence was not controverted. The District Court properly found that amended returns and claims for refund had been mailed. It follows then, that a presumption of receipt by the addressee arose. To rebut the presumption of receipt appellee introduced evidence of nonreceipt which was not controverted. Thus a question of fact as to receipt was raised. The burden of proving receipt fell upon the party asserting receipt, the appellants.

No evidence corroborative of mailing or to show receipt was introduced by appellants to enable them to meet their burden of proof. Even if appellants' evidence is viewed in its most favorable light, this evidence, considered together with that of appellee, raises only a question of fact as to receipt. It is submitted that appellee's positive and undisputed evidence of nonreceipt completely rebuts the presumption of receipt.

The ultimate question to be decided is whether there was a filing within the meaning of 26 U. S. C. 322 (b) (1) and 26 U. S. C. 3772 (a) (1). The record is completely bare of evidence which might show filing. Bare evidence of mailing is not sufficient to show filing. At best, appellants' evidence is inferential of receipt,

no more. To hold that a bare inference of receipt supports in addition an inference of filing is to draw an inference from an inference. This, it is submitted, cannot be done.

Appellee has been unable to find a single case which supports the theory that evidence of mailing standing alone raises a presumption that the mailed matter has been filed.

The requirement of filing under the provisions of 26 U. S. C. 322 (b) (1) and 26 U. S. C. 3772 (a) (1) is jurisdictional. The appellants having failed to sustain their burden of proof of showing filing, it is submitted that the judgment of the District Court should be affirmed.

ANSWER AND ARGUMENT TO APPELLANTS' ARGUMENT THAT "APPELLANTS' EVIDENCE RAISED A PRESUMPTION OF TIMELY FILING OF THEIR CLAIMS FOR REFUND"

Appellants have introduced evidence that amended income tax returns and claims for refund were properly addressed and mailed with postage prepaid to the Collector of Internal Revenue, Tacoma, Washington. This evidence is not disputed.

Appellee concedes that evidence of mailing raises a rebuttable presumption of fact that the mailed matter was received by the addressee in the ordinary course

of mail. *Crude Oil Corporation v. Commissioner of Internal Revenue,* 161 F. 2d 809, 810. The presumption, however, is one of receipt only; it is not a presumption of filing as appellants imply in their brief. Receipt and filing are two different and distinct things.

The general rule on rebuttal of the presumption is well stated in 20 Am. Jur., Evidence, Sec. 201:

> "The presumption that a letter properly mailed was received by the addressee is not conclusive, but may be rebutted by evidence showing that the letter was not in fact received. The sufficiency of such evidence is generally a matter for the determination of the jury.
>
> "There is authority to the effect that the presumption arising upon proof that letters were received by the defendant, which the plaintiff's evidence shows to have been written, properly addressed, and mailed, is entirely overcome by the uncontradicted testimony of the defendant that the letters were never received."

The rule is well supported by the cases.

The United States Supreme Court, in *Rosenthal v. Walker,* 111 U. S. 185, 195, states:

> "The rule is well settled that if a letter properly directed is proved to have been either put into the post office or delivered to the postman, it is presumed, from the known course of business in the post office department, that it reached its destination at the regular time, and was received by the person to whom it was addressed. * * * *Huntley*

> *v. Whittier,* 105 Mass. 391. As was said by Gray, J., in the case last cited, 'the presumption so arising is not a conclusive presumption of law, but a mere inference of fact founded on the probability that the officers of the government will do their duty and the usual course of business, and when it is opposed by evidence that the letters never were received, must be weighed with all the other circumstances of the case, by the jury in determining the question whether the letters were actually received or not.' "

In *Schutz v. Jordan,* 141 U. S. 213, 219, the United States Supreme Court approved a charge to the jury which read in part as follows:

> "The fact that a letter is mailed does not, in court, establish the fact that the person it is mailed to received it. That is not proof of that fact. In certain transactions about protesting notes and charging endorsers of commercial paper and things of that sort, the mere fact of mailing a letter answers; but when a party is to be affected with knowledge of what is in the letter and the contents of it, and what goes with it, they must go further and prove not only that it was mailed, but that the party to whom it was addressed got it."

The court states further at page 220 as follows:

> "So while the mailing of a letter creates an inference, raises a presumption that the party to whom it was addressed received it in due course of mail, and thus acquired knowledge of the matters stated therein, yet such presumption is one of fact, not of law. It is not conclusive, but subject to control and limitation by other facts."

Appellants apparently cite *Avgerinion v. First Guaranty Bank,* 252 Pac. 535, 142 Wash. 73; *Hudson v. United States,* 92 F. Supp. 555; *Crude Oil Corp. v. Commissioner of Internal Revenue,* supra; and *Haag v. Commissioner of Internal Revenue,* 59 F. 2d 516, for the proposition that the presumption raised by evidence of mailing is conclusive of receipt. The courts, in each of the cases cited by appellants, approve the general rule that the presumption raised by mailing is not conclusive but rebuttable. Each of the cited cases turns on its own facts, and merely illustrates application of the rule that the sufficiency of the evidence of mailing and nonreceipt is a question of fact to be decided by the jury or the trier of fact. It is to be noted that in each of the cases cited by appellants there was either evidence corroborative of mailing and receipt or a complete lack of evidence of nonreceipt.

The Supreme Court of the State of Washington has held repeatedly that the presumption of mailing can be rebutted by an affirmative showing of nonreceipt.

In *Ault v. Interstate Savings & Loan Association,* 47 Pac. 13, 15 Wash. 627, the court states at page 634 that:

> "* * * while the testimony on the part of the plaintiff may have been sufficient to raise a presumption that it was received, that presumption was entirely overcome by the testimony on the part

> of the defendant, which was to the effect that such letter had never been received. * * * A letter mailed to a person does not necessarily reach him, and while for convenience sake and from the necessity of business its reception will be presumed, this presumption flowing from the fact that letters usually reach their destination, can have little weight as against positive testimony to the effect that the letter was never received."

In *Collins v. Collins,* 151 Wash. 201, the Court states at page 210, that:

> "The presumption of receipt of a letter deposited in the mail being no more than a prima facie presumption, is therefore offset by the positive evidence of nonreceipt. *Ault v. Interstate Savings & Loan Assn.,* 15 Wash. 627, 47 Pac. 13; *Gibson v. Rouse,* 81 Wash. 102, 142 Pac. 464."

Leahy v. United States, et al., 10 F. 2d 617, involved the proceeds of a war risk insurance contract wherein plaintiff alleged she superseded the original beneficiary. Plaintiff introduced evidence showing that the insured had mailed his notice of change of beneficiary to the Veterans Bureau at Washington two years prior to his death. The defendant introduced evidence that no such notice had been found in the bureau and that no such notice was recorded therein. The Circuit Court in affirming judgment for the defendant stated at page 618:

> "Contrary to plaintiff's contention, mere mailing of notice does not suffice. If not by the Bu-

reau received, mailing goes for nothing, is not performance of the condition. * * *

"Plaintiff further contends that her case is established by the presumption that the notice duly mailed by insured was in ordinary course received by the Bureau. This would be conceded, but for that, if it be granted that due mailing is proven, the presumption to which plaintiff appeals fails for two reasons:

"First, if in the face of evidence the presumption has not served its office to dictate the burden of evidence, and thereupon disappears from the case, it is overcome by the statement of the Bureau (without interest, save justice and of avowed sympathy for plaintiff) that said notice was not by it received.

"Second, if said statement of itself is no more than inference from failure to find the notice in the Bureau, it is fortified by the presumption that, had said notice been received, it would have been preserved, recorded, and acknowledged in ordinary course, as law, regulation, and official duty required; and this latter presumption, in conflict with the former, of itself serves to meet, overcome, or evenly balance the former in the scales wherein evidence is weighed. * * *

"Both presumptions arise from the probability that 'official duty has been regularly performed' and that the 'ordinary course of business has been followed,' perhaps more from the latter, though both reasons have been assigned for the former presumption. See *Henderson v. Carbondale, etc., Co.*, 140 U. S. 37.

but are conditions under which the United States has consented to be sued. The burden was, therefore, upon appellee to have alleged and proven that it had complied with those conditions before its suit could be maintained. This burden it did not and cannot sustain under the facts. These requirements are jurisdictional and must be established by the person invoking the jurisdiction of the court. It is not incumbent upon the United States to specially plead such requirements as a defense, and the District Court should have dismissed the suit for want of jurisdiction."

The United States Supreme Court stated in *Rosenman v. United States*, 323 U. S. 658, 661, that:

"Claims for tax refunds must conform strictly to the requirements of Congress. A claim for refund of an estate tax 'alleged to have been erroneously or illegally assessed or collected must be presented to the Commissioner within three years next after the payment of such tax.' On the face of it, this requirement is couched in ordinary English, and, since no extraneous relevant aids to construction have been called to our attention, Congress has evidently meant what these words ordinarily convey. The claim is for refund of a tax 'alleged to have been erroneously or illegally assessed or collected,' and the claim must have been filed 'after the payment of such tax,' that is, within three years after payment of a tax which according to the claim was erroneously or illegally collected. The crux of the matter is the alleged illegal assessment or collection, and 'payment of such tax' plainly presupposes challenged action by the taxing officials."

In *Worden & Co., Inc. v. United States,* 22 F. Supp. 418, it was held that where the Commissioner found no record of a claim for refund had been filed, such finding was conclusive of nonfiling, the Court stating that the evidence shows that even though a claim may be lost some notation of its receipt should be filed in the files of the Commissioner. To the same effect is *Staten Island Ship Building Co. v. United States,* 33 F. Supp. 134.

At page 13 of appellants' brief, plaintiffs quote from *Hudson v. United States,* supra, to the following effect:

> "It cannot be believed that a just government would take advantage of this technical defense to deny to its citizens that which all considerations of equity and fair dealing would seem to demand."

This argument is well met by the ruling of the Court in *Kavanagh v. Noble,* 332 U. S. 535, where the Court holds that it is for Congress, not the Courts, to provide remedies for inequities resulting from the application of limitations on refunds of Federal taxes, holding that a claim having been filed late under the terms of Section 322 (b) (1) of the Interal Revenue Code was barred by the statute of limitations.

"To file" is defined in Black's Law Dictionary as follows:

> "To put upon the files, or deposit in the custody or among the records of a court. To deliver an in-

> strument or other paper to the proper officer for the purpose of being kept on file by him in the proper place. * * *
>
> "It is commonly held that the filing is complete when the paper is lodged with the proper officer, whose indorsement, though required of him as a duty, is unnecessary to complete the filing or to give validity to the paper filed."

The United States Supreme Court, speaking through Mr. Justice Stone, in *United States v. Felt & Tarrant Manufacturing Company*, 283 U. S. 269, states at page 272:

> "The filing of a claim or demand as a prerequisite to a suit to recover taxes paid is a familiar provision of the revenue laws, compliance with which may be insisted upon by the defendant, whether the collector or the United States. *Tucker v. Alexander*, 275 U. S. 228; *Maryland Casualty Co. v. United States*, 251 U. S. 342, 353, 354; *Kings County Savings Institution v. Blair*, 116 U. S. 200; *Nichols v. United States*, 7 Wall. 122, 130."

The Court further states at page 273:

> "The necessity for filing a claim such as the statute requires is not dispensed with because the claim may be rejected. It is the rejection which makes the suit necessary. An anticipated rejection of the claim, which the statute contemplates, is not a ground for suspending its operation. Even though formal, the condition upon which the consent to suit is given is defined by the words of the statute, and 'they mark the conditions of the claimant's right'."

It is the contention of the appellee that the rule of the *Felt & Tarrant* case is applicable in the instant situation. The courts have consistently refused to accept jurisdiction in actions for the recovery of taxes where no claim for refund has been filed. See *Pacific Mutual Life Insurance Company of California v. United States,* 44 F. 2d 887; *Grandeur Building, Inc. v. Jarecki,* 92 F. Supp. 867; *United States v. Frauenthal,* 138 F. 2d 188; *Dixie Margarine Company v. Shaefer,* 139 F. 2d 221, cert. den. 321 U. S. 791.

In *United States v. Lombardo,* 241 U. S. 73, a criminal case, an indictment was attacked, one of the grounds of the attack being that the offense was committed in the district in which the indictment was found. The gist of the offense was the failure to file a statement with the Commissioner General of Immigration. It was the Government's contention that there was sufficient filing if the required statement was deposited in the post office of the United States, addressed to the Commissioner General, and forwarded through the usual course of mail. However, the court states at page 76:

> "This contention cannot be reconciled with the language employed in the act. The word 'file' was not defined by Congress. No definition having been given, the etymology of the word must be considered and ordinary meaning applied. The word 'file' is derived from the Latin word '*filum,*' and relates to the ancient practice of placing pa-

> pers on a thread or wire for safe keeping and ready reference. Filing, it must be observed, is not complete until the document is delivered and received. 'Shall file' means to deliver to the office and not send through the United States mails. *Gates v. State,* 128 N. Y. Court of Appeals, 221. A paper is filed when it is delivered to the proper official and by him received and filed. Bouvier Law Dictionary; *White v. Stark,* 134 California, 178; *Westcott v. Eccles,* 3 Utah, 258; *In re Van Varcke,* 94 Fed. Rep. 352; *Mutual Life Ins. Co. v. Phiney,* 76 Fed. Rep. 618. Anything short of delivery would leave the filing a disputable fact, and that would not be consistent with the spirit of the act."

The necessity of filing under the terms of 26 U. S. C. 322 (b) (1) and 26 U. S. C. 3772 (a) (1) is jurisdictional and must be established by the person invoking the jurisdiction of the court. Filing is not accomplished by mere mailing. At the very least filing requires actual delivery of the document to be filed to the official charged with filing. Appellee submits that not only have appellants failed to sustain their burden as to filing but have failed to introduce any evidence whatsoever of filing.

ANSWER AND ARGUMENT TO APPELLANTS' ARGUMENT THAT "THE PRESUMPTION OF RECEIPT BY AND FILING WITH THE COLLECTOR OF INTERNAL REVENUE WAS NOT REBUTTED BY APPELLEE'S EVIDENCE."

Appellants state at page 16 of their brief that "the presumption of receipt can only be rebutted by evi-

dence of nonreceipt." Appellee is in accord with this contention and submits that its evidence as to nonreceipt does rebut the presumption of receipt. Appellants further state that appellee had the burden of showing by the evidence that the claims for refund were not received (B. 16-17). To the contrary, the burden of going forward with the evidence does not shift, particularly where the mere inference of receipt raised by the evidence of mailing is disputed. The rule relating to the burden of proof is well stated in *Block, et al. v. Eastern Machine Screw Corporation*, 281 Fed. 777, where the court states at page 779 that:

> "Proof of mailing a letter may, and usually does, raise a so-called presumption that it was received; but this is a disputable inference of fact, and the burden of proof is not thereby shifted to the addressee; it remains upon the one who must prove the notice effected by the letter."

To the same effect is *Farmers Ins. Exchange v. Taylor*, 193 F. 2d 756.

Even viewing appellants' evidence in its most favorable light, it cannot be said that mere evidence of mailing gives rise to an additional presumption of filing within the meaning of 26 U. S. C., Section 322 (b) (1), and 26 U. S. C., Section 3772 (a) (1).

Appellants place much weight on the case of *Arkansas Motor Coaches v. Commissioner of Internal Revenue*, 198 F. 2d. 189. In the *Arkansas* case, supra, it is

worthy of note that there was, in addition to evidence of mailing, evidence that the package mailed had been received in Washington within the statutory time. In fact, the package had been stamped "Rec'd. in bad condition at Washington, D. C.," in two places. Thus actual filing in the *Arkansas* case was delayed until only one day after the statute had run because of the negligence of postal employees in failing to forward the package. In the instant case evidence of receipt by anyone is entirely lacking. In fact, it is worthy of note that one of the appellants waited for almost four years and nine months and the other appellant waited almost five years and ten months before instituting any action on the claims for refund purportedly mailed by them.

In *J. H. Williams & Co. v. United States,* 48 F. 2d 672, another case upon which appellants place heavy reliance, the court found in addition to evidence of mailing that:

> "The certified copies of the amended return and the letter referred to show evidence of the fact that they were fastened together, and they further show that they had been torn apart and the fastener removed." (Page 674.)

It is apparent that the court places great weight on the showing that the documents actually received had been torn apart and the fastener removed, it having been claimed by the plaintiff Williams that the refund

was fastened to the other documents. Based on the evidence of fastening and other testimony given by the plaintiff's attorney, the court was able to state at page 674 that:

> "It is a fair inference that the employee of the amortization section did not properly route the refund claim to the claims control section for appropriate record there."

In the instant case the extent of proof which has been stipulated to by defendant is that there was a mailing. There is absolutely no other evidence of any nature to show actual receipt of a claim for refund or its filing.

Appellants also cite *Central Paper Co. v. Commissioner of Internal Revenue*, 199 F. 2d 902. The facts in the *Central* case do not square in any respect with the facts in the instant case. In the *Central* case there was evidence not only of mailing but also of receipt prior to the expiration of the statute of limitations, whereas in the instant case there was evidence of mailing only.

Eakins v. United States, 36 F. 2d 961 can be distinguished in that the court found that the parties had been in almost continuous contact from the time of the filing of the first claim and the alleged filing of the second claim. Though the government's testimony indicated no record of filing, it seems patent that the

court based its decision that there had been substantial compliance by the taxpayer on the fact that at no time was the government unaware of the taxpayers' contentions. In contrast, appellants in the instant case exhibited conduct amounting to laches in not pressing their claims for refund until four and five years after their purported mailing of amended returns and claims for refund.

Appellants rely on bare evidence of mailing only. This evidence does no more than raise a rebuttable presumption of receipt. Evidence introduced by the appellee, it is submitted, effectively rebuts this presumption. Appellants have introduced no evidence to sustain their burden of proving filing. The presumption of receipt raised by appellants' evidence of mailing certainly raises no presumption of filing. The jurisdictional requirement of filing is for the appellants to prove. They have not done so.

CONCLUSION

It is submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

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